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Issue Date: 01 April 2004

Case No. 1999-BLA-1032

In the Matter of

CHARLES EDWARD COOPER,
Claimant
v.

WESTMORELAND COAL COMPANY,
Employer

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest

APPEARANCES:
James M. Phemister, Esquire, for the Claimant
Kathy L. Snyder, Esquire, for the Employer
Douglas A. Smoot, Esquire, for the Employer

BEFORE: RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER ON REMAND—AWARDING BENEFITS

This proceeding arises from a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, and the Black Lung Benefits Reform Act of 1977, 30 U.S.C. §901 *et seq*. (hereinafter referred to as the Act). This case was referred to the Office of Administrative Law Judges by the District Director, Office of Workers' Compensation Programs, for a formal hearing. Benefits are provided under the Act to a miner who is totally disabled due to pneumoconiosis and to certain survivors of a miner who died due to or while totally (or in certain cases, partially) disabled by pneumoconiosis. Pneumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

This case has a lengthy procedural history, which was thoroughly discussed in the original Decision and Order issued in this case. (D&O, at 1-6).[1] The Claimant, Charles Edward

[1] CX-Claimant's exhibits; EX-Employer's exhibits; DX-Director's exhibits; Tr.-Transcript; D&O-Administrative Law Judge Decision and Order Awarding Benefits dated June 13, 2002; BRB-Benefits Review Board Decision and Order dated July 31, 2003.

Cooper, filed a claim for federal black lung benefits on April 1, 1985; this claim was denied by the District Director. (DX-33, at 246). On September 27, 1985, Claimant filed a request for hearing. (DX-33, at 220). A formal hearing was conducted by Administrative Law Judge Clement J. Kichuk on March 14, 1989. (DX-33, at 53). A Decision and Order Denying Benefits was issued on September 12, 1989, which found that Claimant had not demonstrated that he was totally disabled due to pneumoconiosis. (DX-33, at 39). Following Claimant's appeal to the Benefits Review Board, the BRB affirmed the denial of benefits by Judge Kichuk in a Decision and Order dated March 28, 1991. (DX-33, at 4).

Claimant filed a second (duplicate) claim under 20 C.F.R. §725.309 on July 18, 1996. (DX-1). On January 24, 1997, the District Director awarded benefits on the duplicate claim. (DX-30). Employer requested a formal hearing on January 24, 1997. (DX-31). A second formal hearing was held on August 4, 1997, before Administrative Law Judge Stuart A. Levin. (DX-45). On May 28, 1998, Judge Levin issued a Decision and Order denying the claim on the grounds that the Claimant had not demonstrated a material change of conditions since the 1989 denial. (DX-47). Claimant initially appealed this denial of benefits, but later withdrew the appeal. (DX-50; DX-53).

On September 2, 1998, Claimant submitted additional medical evidence to the District Director and requested modification of Judge Levin's decision denying the claim. (DX-55). On April 23, 1999, the District Director issued a Proposed Decision and Order Awarding Benefits, finding that Claimant was totally disabled as of January 9, 1999. (DX-80). Claimant requested a formal hearing before an Administrative Law Judge on the issues of complicated pneumoconiosis and the date on which he became disabled; Employer also requested a formal hearing. (DX-82; DX-83).

Although this matter involved a request for modification of the decision of Judge Levin, who remained available to hear the request for modification, the case was assigned to the undersigned Administrative Law Judge. A formal hearing was held on May 17, 2000, in Charleston, West Virginia. (Tr. at 1). During the hearing, Director's Exhibits 1 through 85[2] were admitted into the record. (Tr. at 9). Claimant offered five exhibits, marked as CX-1 through CX-5, which were admitted into the record.[3] (Tr. at 12). Employer offered twenty-three exhibits, identified as EX-1 through EX-23, which were admitted without objection. (Tr. at 22).

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[2] DX-86 was excluded, as it was an ex parte memo to the file of no relevance in this proceeding. DX-80 was admitted for the limited purpose of documenting any trust funds expended; it is otherwise of no relevance in this de novo proceeding. (Tr. at 8).

[3] Claimant's Exhibits 1, 2, and 3 were admitted without objection. Employer objected to CX-4 and CX-5 on the grounds that these exhibits were served twenty-two days prior to the hearing and sought an opportunity to rebut pursuant to *Shedlock v. Bethlehem Mines Co.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on recon.*, 9 B.L.R. 1-236 (1987) (*en banc*). Claimant responded by arguing that *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143 (4th Cir. 1991), limits the application of *Shedlock* in cases arising in the Fourth Circuit, and further argued that Employer was not surprised by the documents because Claimant had previously identified the witnesses to whom the exhibits related in its answers to interrogatories. Employer acknowledged that it was not surprised by CX-4 and CX-5; therefore, Employer was not permitted to respond to the exhibits post-hearing, and CX4 and CX-5 were admitted. (D&O, at 3-4; Tr. at 10-12).

The case which was before me, involved a request to modify the decision of Judge Levin, in which he denied a (second) duplicate claim for black lung benefits. Judge Levin had denied the duplicate claim, in which the Claimant had asserted a material change of conditions since his first duplicate claim had been denied by Judge Kichuk. Therefore, the analysis of the matter involved, first, a determination of whether a mistake in a determination of fact had been made by Judge Levin or whether a change of conditions had occurred since the decision by Judge Levin. Upon consideration of the record, it was found that a mistake had been made in the determination of a fact. Therefore, grounds existed to modify the decision of Judge Levin.

Second, since Judge Levin's decision was to deny a duplicate claim, this left the case before me in the same posture as that considered by Judge Levin. As such, the case was next considered under the duplicate claim standard of § 725.309.

Upon reconsideration of Claimant's duplicate claim, I found that the X-ray evidence was negative for complicated pneumoconiosis prior to October 1, 1985. (D&O, at 29). I further found that the existence of simple pneumoconiosis due to coal mine employment was established in this case as of Judge Kichuk's 1989 decision. (D&O, at 30). I found that the preponderance of the evidence established that the Claimant had subsequently developed complicated pneumoconiosis within the meaning of Section 718.304(c), and that Claimant was entitled to the irrebuttable presumption under Section 718.304 that he is totally disabled due to pneumoconiosis. (D&O, at 31). Therefore, it was determined that Claimant had established a material change of conditions following the denial of his claim by Judge Kichuk on September 12, 1989. As a result, I found that Claimant was entitled to federal black lung benefits as of September 12, 1989, the date on which the initial claim was denied, because the decision was based upon a finding of a material change of conditions. (D&O, at 31). Accordingly, on June 13, 2002,[4] a Decision and Order Awarding Benefits was issued (D&O, at 28).

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[4]The over two-year delay between the date of the formal hearing and the date that the Administrative Law Judge's Decision and Order Awarding Benefits was issued was due to the controversy regarding the application of amendments to the black lung regulations, which became effective on January 19, 2001. (D&O, at 5). A preliminary injunction was sought in the United States District Court for the District of Columbia by the National Mining Association (which is not a party in the instant matter) to enjoin implementation of certain provisions of the amended regulations, which was subsequently granted. (D&O, at 5). The parties in the instant matter were provided the opportunity to submit briefs to the undersigned regarding the applicability of the amendments. Claimant and the Director each filed briefs asserting that the new regulations would not impact the outcome of the pending litigation. In its brief, Employer argued that the new Part 718 would affect the outcome of the case. Because the parties could not agree to the applicability of the new regulations, an order was issued staying the decision pending the District Court's decision as to the validity of the regulations. (D&O, at 5).

The United States District Court for the District of Columbia issued a decision on August 9, 2001, finding that the regulations, as amended, were valid, and therefore, the preliminary injunction was dissolved. (D&O, at 6). The parties in the instant matter were permitted to submit briefs as to how they wished to proceed in this matter. Claimant filed a brief renewing his argument that the new regulations did not impact the case and requested that a decision be issued. (D&O, at 6). Employer maintained its position that the regulations could not be applied retroactively (which was contrary to the findings of the District Court) and requested that, if the new regulations were applied, the case should be remanded or the record reopened to permit an opportunity to submit new evidence addressing the changed standards. (D&O, at 6). An order was issued on August 23, 2001, denying Employer's request for remand and permitting the reopening of the record for thirty days for submission of evidence specifically addressing application of the new regulatory standards. No additional evidence or briefs were filed in response to this order, except for Employer's letter in which it objected to the retroactive application of the new regulations and

Employer appealed the Decision and Order Awarding Benefits to the Benefits Review Board. By a decision and order dated July 31, 2003, the Board affirmed in part and vacated in part the Decision and Order Awarding Benefits and remanded this matter for further consideration.

On December 15, 2003, an order was issued permitting the parties thirty days to file briefs addressing the issues raised by the Board in its remand order. By motion dated January 13, 2004, Counsel for Employer requested an extension of time to file its closing brief on remand. By order dated January 14, 2004, the extension was granted without objection, and Employer was permitted until January 21, 2004, to submit its closing brief. By motion dated January 16, 2004, Counsel for Claimant also requested an extension of time to file its closing brief on remand. An order was issued on January 21, 2004, permitting Claimant until January 21, 2004, to submit its closing brief.

ISSUES

The issues presented on remand are:

1. Clarification of the proper characterization of the record and reweighing of the readings by Drs. Wheeler and Gaziano of the August 9, 1996, X-ray with regard to whether Claimant has ever been diagnosed with tuberculosis;

2. The proper weight to assign to the interpretation of the August 9, 1996, X-ray by Dr. Francke;

3. The proper weight to assign to the interpretation of the August 9, 1996, X-ray by Dr. Castle;

4. Clarification of the assessment of the relevant X-ray evidence and reweighing this evidence with regard to Claimant's burden to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

5. If benefits are awarded, the import of the fact that Claimant established a mistake in determination of fact under 20 C.F.R. §725.310 (2000), and consideration of the relevant evidence using the preponderance of the evidence standard to determine the date from which benefits are payable pursuant to 20 C.F.R. §725.503(d)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the outset, it is noted that the Board's decision remanding this case instructs that the x-ray evidence be re-weighed under §718.304(a) to determine if the Claimant has established

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reserved its right to file additional evidence if the Claimant filed additional medical evidence on remand. (D&O, at 6).

invocation of the irrebuttable presumption. However, the Board goes on to affirm the finding that the weight of the CT scan evidence shows that the Claimant has complicated pneumoconiosis under § 718.304(c), citing *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 1999).

CT Scan Evidence of "Complicated" Pneumoconiosis

The United States Court of Appeals for the Fourth Circuit in *Scarbro*, albeit in a case involving the irrebuttable presumption of death due to complicated pneumoconiosis, discusses the alternate methods of invocation of the irrebuttable presumption in § 718.304. The Court holds that, "Prongs (A), (B), and (C) are stated in the disjunctive; therefore a finding of statutory **complicated pneumoconiosis** may be based on evidence presented under a single prong. But the ALJ must in every case review the evidence under each prong of §921(c)(3) for which relevant evidence is presented to determine whether **complicated pneumoconiosis** is present." *Scarbro*, 220 F.3d 250, 255 (emphasis in original).

In affirming the finding of complicated pneumoconiosis on the basis of the CT scan evidence, the Board states,

> Substantial evidence in the record, including the CT scan interpretations by Drs. Alexander, Patel, and Cohen, supports the administrative law judge's finding that the weight of the CT scan evidence shows that claimant has complicated pneumoconiosis. The administrative law judge, in weighing the conflicting CT scan interpretations of record, properly found that Dr. Alexander is the *only* physician who read the May 19, 1998 CT scan who is board-certified in nuclear medicine as well as in radiology. *See Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1987). The administrative law judge's reliance on the CT scan interpretations by Drs. Alexander, Cohen, and Patel is consistent with existing law. 20 C.F.R. § 718. 304(c); *Scarbro, supra; Melnick, supra.* We, therefore, affirm the administrative law judge's finding that the weight of the CT scan evidence shows that claimant has complicated pneumoconiosis.

BRB decision at 12 (Jul 31, 2003).

Clearly, the Board has affirmed that the CT scan evidence establishes the existence of the equivalent of opacities larger than one centimeter in diameter under § 718.304(c). Applying the Court's rationale in *Scarbro* to the facts of this case, it is my opinion that this CT scan evidence can lose force only if the other relevant evidence (in this case, X-ray evidence) affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Tuberculosis

The next issue to be addressed is the clarification of the record and reweighing of the August 9, 1996, X-ray readings by Drs. Wheeler and Gaziano with regard to whether Claimant

has ever been diagnosed with tuberculosis. In the original Decision and Order Awarding Benefits, I found that "there was no evidence in the record to indicate that the Claimant has ever been diagnosed with or treated for tuberculosis." (D&O, at 28). In particular, I noted that Dr. Wheeler read the August 9, 1996, X-ray as showing no large opacities, but did find an "Oval 1X2 CM mass or scar or pleural fibrosis in lateral portion right upper chest between anterior ribs-2-3," which Dr. Wheeler attributed to tuberculosis. More particularly, Dr. Wheeler stated that "Peripheral upper lobe disease favors TB over pneumoconiosis." (D&O, at 27; DX-27). However, I discredited Dr. Wheeler's opinion as to the cause of the mass because the size of the mass was compatible with the requirement of an opacity of one centimeter or greater under Section 718.304(a). (D&O, at 28).

I also discredited Dr. Gaziano's interpretation of the August 9, 1996, X-ray. Dr. Gaziano found Category A large opacities, but also diagnosed "bilateral apical density rule out T.B. [Tuberculosis] Need see M.D." (D&O, at 28; DX-13). Again, finding that there was no evidence that Claimant was ever treated for or diagnosed with tuberculosis, I discredited Dr. Gaziano's reading of that X-ray. Additionally, it was noted that Dr. Gaziano's opinion was overall accorded less weight because he was not a Board Certified Radiologist. (D&O, at 28).

The Board found that "[w]hile the administrative law judge correctly indicated that there is no evidence showing that claimant has ever been treated for tuberculosis, he erroneously found no evidence showing that claimant has ever been diagnosed with tuberculosis." (BRB, at 6 (footnote omitted)). The Board cited numerous Director's and Employer's exhibits in the record that it found contained "medical interpretations of numerous x-rays and the May 19, 1998 CT scan in which the interpreting physician found tuberculosis or healed tuberculosis or changes consistent with tuberculosis or healed tuberculosis." (BRB, at 5). As a result, the BRB directed that the characterization of the record with regard to the X-ray readings of the August 9, 1996, X-ray by Drs. Wheeler and Gaziano be clarified and that this evidence be reweighed. (BRB, at 6).

Claimant argues in his Brief on Remand that the court should find that the X-ray interpretations noting tuberculosis are all equivocal, speculative, poorly documented, and lack a well-reasoned basis. (Cl. Memo. of Law on Rem., at 6). Claimant asserts that these interpretations are equivocal because the interpretations are qualified with statements such as "tbc?" "rule out TB," and "compatible with Tb." (Cl. Memo. of Law on Rem., at 6). Claimant also points out that the X-ray interpretations also contain notations indicating that Claimant possibly has a granulomatous disease; however, these notations also come in the form of qualified statements. (Cl. Memo. of Law on Rem., at 7).

Claimant also contends that the tuberculosis interpretations are speculative. Claimant notes, as the Board stated in its Decision and Order remanding this matter, that Employer is under no duty to prove the etiology of the opacities that appear in the X-rays; however, the court must consider "the weakness of the evidence of tuberculosis," just as it did when it determined that Claimant met his burden of proving complicated pneumoconiosis. (Cl. Memo. of Law on Rem., at 7-8). Claimant argues that the underlying evidence of tuberculosis is deficient by virtue of the fact that many of the tuberculosis notations are "based only upon the reading of a single X-ray of CT scan (or, at most, the simultaneous reading of several radiographs) rather than on all of

the evidence in the record that bears on the question of whether [Claimant] has tuberculosis." (Cl. Memo. of Law on Rem., at 8). Along the lines of lack of documentation and poor reasoning, Claimant asserts that none of Employer's radiologists considered Claimant's over 30-year history of employment in underground mines; Claimant's clinical history showing none of the classic signs of tuberculosis; or the results of the clinical and arterial blood gas studies.[5] (Cl. Memo. of Law on Rem., at 8).

As to the interpretations of the August 9, 1996, X-ray by Drs. Wheeler and Gaziano, Claimant argues that the ALJ properly afforded greater weight to Dr. Wiot's readings of complicated pneumoconiosis because of his superior credentials. (Cl. Memo. of Law on Rem., at 9). To support this argument, Claimant points out that the Board affirmed the finding that Dr. Wiot held superior credentials and therefore, that according greater weight to Dr. Wiot's interpretation of the August 9, 1996, X-ray was and remains proper. (Cl. Memo. of Law on Rem., at 9 (citing BRB, at 4-5)).

Conversely, Employer maintains that Dr. Wheeler's interpretation should be accorded more weight overall because he reviewed additional and more recent evidence. (Empl. Memo. of Law on Rem., at 8). Employer does not otherwise directly address the Board's instruction with regard to the reweighing of the August 9, 1996, X-ray readings by Drs. Wheeler and Gaziano. As to the larger question of whether the record as a whole shows evidence of tuberculosis, Employer contends that the number of interpretations of the CT scan finding complicated pneumoconiosis is fewer than the number finding evidence of healed tuberculosis. Employer asserts that the doctors who found evidence of tuberculosis have superior credentials over those who found evidence of complicated pneumoconiosis in the CT scans, and therefore the findings of tuberculosis should be accorded greater weight. (Empl. Memo. of Law on Rem., at 10-11).

The Board states that there are numerous X-ray interpretations and a CT scan taken on May 19, 1998, that indicate tuberculosis or healed tuberculosis. A review of the record shows that, while *interpreting* physicians found evidence compatible with tuberculosis, no *treating* doctor ever found that Claimant currently had or ever in the past had tuberculosis. Further, the interpreting physicians merely *suggested* tuberculosis, along with other possible diseases, as an explanation for the opacities, as none of the interpreting physicians who read any X-ray or CT scan as indicating the possibility of tuberculosis offered any other proof that Claimant had ever had that disease.

To this extent, the ILO classification chart contains a definition for the additional symbols used when interpreting X-rays, and states: "It is to be taken that the definition of such of the Symbols is preceded by an appropriate word or phrase such as 'suspect', 'pneumoconiotic changes suggestive of', or 'opacities suggestive of', etc." As such, even without a physician explicitly using such a phrase preceding his or her finding of tuberculosis, the ILO classification ***presumes*** that such a finding is only suspect or suggestive of pneumoconiotic changes. Therefore, without more evidence to substantiate this type of opinion that an opacity is

[5] Claimant also asserts that Employer's radiologists failed to consider the results of Claimant's skin test, which was negative for tuberculosis. (Cl. Memo. of Law on Rem., at 8). A review of all of the medical evidence in the record, however, does not reveal any evidence of a tuberculosis skin test.

tuberculosis rather than pneumoconiosis caused by coal mine employment, opinions of tuberculosis are necessarily and by their nature equivocal. None of the physicians who interpreted X-rays and/or CT scans offered any additional evidence to support their suggestion that Claimant possibly had or has tuberculosis.

For example, Dr. Ralph Shipley provided interpretations of X-rays dated July 28, 1995, and August 27, 1996, as well as a follow-up letter expanding upon his findings. (DX-28). In his interpretation of the August 27, 1996, X-ray, Dr. Shipley stated that the opacities were "[p]robably healed TB or Histo." Dr. Shipley's view, as well as the views of the other physicians interpreting X-rays and/or CT scans and making a similar suggestion as to tuberculosis, cannot be considered anything more than equivocal, as there is no indication that these physicians ever found other evidence of tuberculosis or that they were his treating physician.

Conversely, Dr. Cohen, who conducted an extensive review of Claimant's medical records, X-rays, and X-ray and CT scan interpretations by other physicians, noted that he has diagnosed and treated many patients for tuberculosis and published articles on the radiologic appearance of the disease. Dr. Cohen found that Claimant exhibited neither the clinical syndrome of tuberculosis nor did his medical history contain any clinical, physical, or microbacteriologic evidence of tuberculosis. (CX-4). According to Dr. Cohen, "[s]cars of such magnitude would also have been expected to be associated with a significant syndrome of active pulmonary tuberculosis which Mr. Cooper clearly does not have." (CX-4). Instead, Dr. Cohen found that Claimant had Category A pneumoconiosis. (CX-4).

Similarly, Dr. Koenig noted that the radiographic characteristics, historical features, and change in opacities were consistent with a diagnosis of complicated pneumoconiosis as opposed to tuberculosis or other granulomatous infections. (CX-5). Claimant had no weight loss, and actually gained weight over time. None of Claimant's family members exhibited symptoms of the highly-contagious tuberculosis. Dr. Koenig's review of Claimant's X-rays revealed opacities that are small and round with well-defined borders. However, according to Dr. Koenig, opacities associated with tuberculosis are typically "patchy" or "streaky" with ill-defined borders. Dr. Koenig also noted that opacities associated with tuberculosis become enlarged much more quickly than those associated with complicated pneumoconiosis, with the tuberculosis-related opacities growing and changing in size over a short period of time as opposed to the years that it takes for pneumoconiosis-related opacities to change in size. Finally, Dr. Koenig notes that, even if the opacities were associated with healed tuberculosis or histoplasmosis, such scars should not increase in size over time. Therefore, Dr. Koenig opined that Claimant had complicated pneumoconiosis, given his 35-year history of coal mine employment and the types of opacities that were present on the X-rays. (CX-5).

Dr. Alexander, who holds superior credentials as a B reader, Board-Certified Radiologist, and is Board Certified in Nuclear Medicine, also found no evidence of tuberculosis. (CX-1). Dr. Alexander interpreted a number of X-rays, beginning with the X-ray taken on October 13, 1985, and including the X-ray taken on November 4, 1998. He also interpreted the CT scan taken on May 19, 1998. Dr. Alexander specifically found no evidence of active or healed tuberculosis, but did find evidence of complicated pneumoconiosis. (CX-1).

As to Dr. Wheeler's reading of the August 9, 1996, X-ray, the Board notes that I found that Dr. Wheeler's opinion (as stated in the phrase "Peripheral upper lobe disease favors TB over pneumoconiosis") was equivocal. However, the Board then found error in the decision to accord less weight to Dr. Wheeler's opinion as to whether Claimant was diagnosed with tuberculosis. The remaining portion of Dr. Wheeler's opinion merely gives his assessment of the size of the mass in the lateral portion of Claimant's right upper chest. Without the subsequent statement that the mass "favors TB over pneumoconiosis," Dr. Wheeler's opinion is diminished as to a diagnosis of tuberculosis. Dr. Wheeler did note in his interpretation of this X-ray "Few small nodules and linear scars in periphery upper lobes compatible with TB unknown activity, probably healed." This statement is also equivocal because Dr. Wheeler states that the scars are "compatible with TB" and follows this with "unknown activity" and "probably healed." The equivocal nature of Dr. Wheeler's interpretation is not only explicit, but also implicit, given the language used in the ILO classification chart, and the fact that Dr. Wheeler has provided no other evidence to substantiate his suggestion of tuberculosis. These reasons, coupled with the fact that Dr. Wheeler never treated or examined Claimant, result in little weight being accorded to his X-ray interpretation.

Dr. Gaziano's interpretation of the August 9, 1996, X-ray notes "tuberculosis; 'bilateral apical density rule out T.B. [Tuberculosis] Need see M.D'" in addition to Category A large opacities. (DX-13). Dr. Gaziano's description is ambiguous in nature, in that while he suggests the possibility of the presence of tuberculosis, he is uncertain about his finding, as he wrote that Claimant needed to see a doctor. Further, Dr. Gaziano, as noted in the Decision and Order Awarding Benefits, is a B reader, and did not treat or examine Claimant for any condition. Dr. Gaziano, like Dr. Wheeler, provided no additional information to substantiate his suggestion that Claimant had or has tuberculosis. Therefore, Dr. Gaziano's interpretation of the August 9, 1996, X-ray is accorded less weight.

Therefore, upon reconsideration of this evidence, I find that the Claimant was never treated for tuberculosis. Further, Claimant has never been diagnosed with tuberculosis by a treating physician. The physicians who have suggested tuberculosis in their interpretations of a CT scan and X-rays were never involved in any treatment of Claimant for tuberculosis and do not submit further evidence that Claimant has or ever had tuberculosis. Finally, there is significant, well-reasoned, and well-documented evidence from Drs. Cohen, Koenig and Alexander that Claimant does not have tuberculosis. Therefore, the X-ray and CT scan readings suggesting tuberculosis are necessarily deemed equivocal and given less weight. As a result, the readings of the August 9, 1996, X-ray by Drs. Wheeler and Gaziano are accorded less weight not only because the interpretations merely suggest tuberculosis, but also because more weight is assigned to the interpretations of their more highly qualified counterpart Dr. Alexander and his well-reasoned colleagues mentioned above.

Weight of the X-Ray Reading by Dr. Francke

Next, the Board found that reversible error was committed in failing to weigh the interpretation of the August 9, 1996, X-ray provided by Dr. Francke, and instructed that Dr. Francke's interpretation be weighed on remand with all other relevant evidence to determine

whether Claimant has complicated pneumoconiosis. (BRB, at 6). In the original Decision and Order Awarding Benefits, Dr. Francke's interpretation was noted as being credited by Judge Levin when he found that Claimant did not have complicated pneumoconiosis. (D&O, at 27). The discussion in the original Decision and Order then turned to additional interpretations of the same X-ray, including the interpretation rendered by Dr. Wiot, a B reader, Board Certified Radiologist, and an adviser in the development of the B reader program by the National Institute for Occupational Safety and Health ("NIOSH"). Because of Dr. Wiot's superior credentials, his interpretation of the August 9, 1996, X-ray was accorded greater weight when the conflicting X-ray readings were evaluated. (D&O, at 27-28).

In his interpretation of the August 9, 1996, X-ray, Dr. Francke noted that the X-ray was of film quality 1 and showed pneumoconiotic opacities in six zones, size p/p, and of profusion 1/1. Dr. Francke found no large opacities. (DX-12). Dr. Francke also noted a deformity in Claimant's right clavicle and right upper ribs from an old injury, which he associated with thickening of pleura. (DX-12). Dr. Francke is a B reader and a Board Certified Radiologist. (DX-12).

Claimant argues in his Brief on Remand that the court should find that Dr. Francke's opinion should be accorded less weight than Dr. Wiot's opinion because Dr. Wiot has credentials that are superior to those held by Dr. Francke. (Cl. Memo. of Law on Rem., at 10). Claimant also asserts that Dr. Francke read only one X-ray and has "limited exposure" to Claimant's condition as compared to Dr. Wiot, who read several X-rays and found that all of the X-rays indicated Category B large opacities. (Cl. Memo. of Law on Rem., at 10). Claimant cites to *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), for the proposition that the court must consider all of the evidence together as well as individually to determine if that evidence proves the existence of pneumoconiosis. (Cl. Memo. of Law on Rem., at 10). Claimant notes that the Board did not disturb the court's finding that Claimant has complicated pneumoconiosis and urges that the court should not reconsider its finding in this regard. Because Dr. Francke did not find that Claimant has complicated pneumoconiosis, Claimant reasons that the court should, as it did for other medical evidence in this case that did not contain findings of complicated pneumoconiosis, find that Dr. Francke's opinion is entitled to little weight. (Cl. Memo. of Law on Rem., at 10-11).

Employer argues that Dr. Francke is one of eleven physicians who hold dual certifications as B readers and Board Certified Radiologists who interpreted Claimant's X-rays as failing to establish the existence of complicated pneumoconiosis. (Empl. Memo. of Law on Rem., at 7). Employer contrasts the interpretations of these doctors with the interpretations of Drs. Alexander, Patel, and Wiot, who interpreted the X-rays as positive for complicated pneumoconiosis, and asserts that "the overwhelming preponderance of the evidence by those physicians who are both board-certified radiologists and B-readers is negative for the existence of complicated pneumoconiosis." (Empl. Memo. of Law on Rem., at 8). Like Claimant, Employer also addresses the opinion of Dr. Wiot in relation to the interpretations by physicians who did not find evidence of complicated pneumoconiosis on Claimant's X-rays. Employer argues that Dr. Wiot's interpretations are "hampered by a lack of data" because he did not review six more recent X-rays, which were dated November 19, 1997, through February 1, 2002. (Empl. Memo. of Law on Rem., at 8).

It appears that Employer is arguing, indirectly, that Dr. Francke's opinion draws its strength from being in agreement with similar interpretations provided by other physicians. However, Employer's argument fails because not only must Dr. Francke's opinion be considered along with the interpretations that agree with Dr. Francke's, but also with those opinions that disagree, because, as the Board stated, *all* of the evidence must be considered. The credentials of the physicians rendering the opinions must also be considered when the evidence is weighed.

Considering all of the relevant evidence, I find that the opinion rendered by Dr. Francke in his interpretation of the August 9, 1996, X-ray is entitled to less weight. First, Dr. Francke provided only an interpretation of the X-ray in question; he did not further expound upon his findings. There is no indication that Dr. Francke examined either Claimant or his other medical records, nor is there any indication that Dr. Francke took the length of Claimant's coal mine employment into account. Further, while Dr. Francke's credentials are noteworthy, as stated in the original decision, Dr. Wiot possesses superior credentials, and therefore, his interpretation is accorded greater weight than that rendered by Dr. Francke. It is true that in Judge Levin's original decision, he accorded greater weight to the opinions of Drs. Francke, Scott, and Wheeler, all of whom are B readers and Board Certified Radiologists. However, the decision in the instant matter must now be made by taking into account *all* the relevant evidence that currently exists with regard to whether Claimant exhibited a material change of condition when he filed his duplicate claim, including Dr. Wiot's opinion, which was submitted in the current proceedings. (D&O, at 27). Finally, the Board affirmed the previous findings of the undersigned that Dr. Wiot's interpretation of this particular X-ray be accorded greater weight due to Dr. Wiot's superior qualifications. (BRB, at 4). Therefore, all of the evidence, including the credentials of the physicians, must be accounted for in determining the weight to be accorded the medical opinions and interpretations. In light of the foregoing, I find that Dr. Francke's opinion is entitled to less weight than Dr. Wiot's opinion.

Weight of the X-Ray Reading by Dr. Castle

The Board also found that reversible error was committed in failing to weigh the interpretation of the August 9, 1996, X-ray provided by Dr. Castle, and instructed that Dr. Castle's interpretation and medical opinion be weighed on remand with all other relevant evidence. (BRB, at 8). In the original Decision and Order Awarding Benefits, Dr. Castle's interpretation of the August 9, 1996, X-ray was discussed in regard to the previous findings of Judge Levin. It was noted that Judge Levin found that Dr. Castle, a B reader, found no evidence of complicated pneumoconiosis in the August 9, 1996, X-ray. (D&O, at 27). The original Decision and Order Awarding Benefits then went on to discuss, as noted above, additional interpretations of the same X-ray, including the interpretation rendered by Dr. Wiot, whose credential were noted above. Because of Dr. Wiot's superior credentials, his interpretation of the August 9, 1996, X-ray was accorded greater weight when the conflicting X-ray readings were evaluated. (D&O, at 27-28).

Dr. Castle, a B reader, interpreted the August 9, 1996, X-ray as showing pneumoconiotic opacities in six zones of size p/q, and of profusion 1/1. (DX-24). Dr. Castle also noted no large

opacities, but did note multiple old rib fractures on the right side and a pleural scar adjacent to the fracture. (DX-24). Dr. Castle also noted an old clavicle fracture. (DX-24).

Claimant argues that Dr. Castle's interpretation of the August 9, 1996, X-ray, in which Claimant states Dr. Castle found evidence of simple pneumoconiosis, should be accorded less weight because "Dr. Wiot's X-ray reading and the other evidence of complicated pneumoconiosis should be accorded more weight than Dr. Castle's opinion." (Cl. Memo. of Law on Rem., at 11).

While Employer does not address the specific weight that Dr. Castle's interpretation of the X-ray in question should be accorded, it does argue in general that Dr. Castle's medical opinions should be accorded more weight because "[t]he well-reasoned and well-documented assessments of these physicians establish the Claimant does not have complicated coal workers' pneumoconiosis." (Empl. Memo. of Law on Rem., at 12).

Upon reconsideration of all of the evidence, I find that Dr. Castle's interpretation of the August 9, 1996, X-ray should be accorded less weight. In comparison to Dr. Wiot, Dr. Castle holds lesser qualifications. There is no indication that, at the time he provided his interpretation of the August 9, 1996, X-ray, Dr. Castle had personally examined Claimant, that Dr. Castle had examined any of Claimant's medical records, or that Dr. Castle took into account the length of Claimant's coal mine employment. Dr. Castle interpreted the August 9, 1996, X-ray on December 10, 1996, prior to his examinations of Claimant on February 19, 1997, and November 4, 1998, and prior to his review of Claimant's medical records on April 27, 2000. (DX-35; DX-78; EX-23). Further, the Board affirmed the previous findings of the undersigned that Dr. Wiot's interpretation of this particular X-ray be accorded greater weight due to Dr. Wiot's superior qualifications. (BRB, at 4). Therefore, Dr. Castle's interpretation of the August 9, 1996, X-ray is accorded less weight.

Clarification and Weight of X-Ray Evidence Regarding Material Change in Conditions

The Board found that error was committed in according less weight to the negative X-ray readings of Drs. Wheeler, Scott, Kim, Fino, Shipley, Spitz, and Dahhan because it was erroneous to find that no evidence existed showing the Claimant has or had ever had tuberculosis. (BRB, at 9). The Board also found that error was committed when the ALJ failed to indicate what weight he assigned to "Dr. Wiot's X-ray readings in finding that the X-ray evidence establishes complicated pneumoconiosis and thus a material change in conditions at 20 C.F.R. §725.309 (2000)." (BRB, at 9). Further, the BRB held that Employer correctly argued on appeal that error was committed by including Dr. Castle in the group of physicians who found Claimant did not have simple pneumoconiosis. (BRB, at 9). Therefore, the Board instructed on remand that the assessment of the relevant X-ray evidence regarding Claimant's burden to establish a material change in conditions at 20 C.F.R. §725.309 (2000), be considered. (BRB, at 10).

The original Decision and Order Awarding Benefits discussed, among other things, the finding that the X-ray evidence was negative for complicated pneumoconiosis prior to October 1, 1985. (D&O, at 29). The X-ray evidence following that date was discussed, and Dr. Wiot's findings of large opacities were specifically noted. (D&O, at 30). When all of the evidence was

weighed, I found that the negative X-ray readings by Drs. Wheeler, Scott, Kim, Fino, Shipley, Spitz, Dahhan, and Castle were entitled to less weight because it was previously established in 1989 that Claimant had simple pneumoconiosis. (D&O, at 30). I also found that the X-ray interpretations suggesting evidence of tuberculosis instead of pneumoconiosis were speculative in nature and unsupported by other medical evidence. (D&O, at 30).

Further, I found that some physicians opined that Claimant did not have large opacities, but simultaneously read the X-rays as showing masses that were larger than one centimeter. Because these findings were consistent with a diagnosis of complicated pneumoconiosis within the definition of Section 718.304, I found that the readings were consistent with a finding of an opacity of at least category A size. (D&O, at 30-31). I also found that a preponderance of the CT scan evidence established the existence of complicated pneumoconiosis equivalent to an X-ray opinion that Claimant has opacities of at least one centimeter in size within the meaning of §718.304(c). (D&O, at 31). As a result, I concluded that Claimant was entitled to the irrebuttable presumption of Section 718.304 that he is totally disabled due to pneumoconiosis, and that, on his duplicate claim, Claimant established a material change of conditions following the denial of his claim by Judge Kichuk on September 12, 1989. (D&O, at 31).

Claimant argues that he established a material change of condition after Judge Kichuk denied his claim in 1989. Claimant reiterates that his arguments as to the treatment of the diagnoses of tuberculosis also apply to the issue of whether a material change of condition was established, and that the court should accord less weight to the opinions of Drs. Wheeler, Scott, Kim, Fino, Shipley, Spitz, and Dahhan since their interpretations are contrary to the record. (Cl. Memo. of Law on Rem., at 11-12). As to the weight of Dr. Wiot's opinions, Claimant asserts that great weight should be given to his readings because of his superior credentials (a finding which the Board credited in its decision) and because "Dr. Wiot's interpretations are consistent with the preponderance of the other evidence of record including [Claimant's] doctors' reasoned medical opinions and the CT scan evidence." (Cl. Memo. of Law on Rem., at 12). With regard to Dr. Castle, Claimant states that Dr. Castle found evidence of simple but not complicated pneumoconiosis on the August 9, 1996, X-ray, but that overall, Dr. Wiot's opinions and the other evidence of complicated pneumoconiosis should be afforded greater weight than Dr. Castle's opinion. (Cl. Memo. of Law on Rem., at 11).

Employer makes the following arguments regarding the whether a material change in condition was established by Claimant. First, Employer argues that eleven physicians, including Drs. Wheeler, Scott, Sargent, Kim, Shipley, Francke, and Bassali, who hold dual certifications as B readers and Board Certified Radiologists, interpreted Claimant's X-rays as failing to establish the existence of complicated pneumoconiosis, whereas only three physicians interpreted the X-rays as positive for complicated pneumoconiosis. (Empl. Memo. of Law on Rem., at 7-8). Therefore, Employer argues, "the overwhelming preponderance of the evidence by those physicians who are both board-certified radiologists and B-readers is negative for the existence of complicated pneumoconiosis." (Empl. Memo. of Law on Rem., at 8). Employer also argues that the X-ray interpretations provided by Drs. Fino, Dahhan, and Castle are entitled to the greatest weight because they are well-reasoned, well-documented, and are supported by objective evidence. (Empl. Memo. of Law on Rem., at 12). Employer further argues that the interpretations of Drs. Wheeler, Scott and Kim "should be credited over the interpretations by

Drs. Patel and Alexander based on their superior credentials." (Empl. Memo. of Law on Rem., at 11).

As to Dr. Wiot's medical opinions, Employer argues that his opinion is hindered because Dr. Wiot did not interpret six more recent X-rays nor did he review the CT scan dated May 19, 1998. (Empl. Memo. of Law on Rem., at 8). Instead, Employer argues that, because Drs. Wheeler, Scott, Sargent, and Kim reviewed these more recent X-rays and the CT scan, their opinions should be credited over Dr. Wiot's. (Empl. Memo. of Law on Rem., at 8).

Alternatively, Employer argues that "[a]t best, the radiographic evidence can be found equally probative regarding the existence of complicated coal workers' pneumoconiosis," and therefore, Claimant has failed to invoke the irrebuttable presumption under 20 C.F.R. §718.304. (Empl. Memo. of Law on Rem., at 8-9). To this extent, Employer argues that the CT scan provides the "most significant new evidence" as to Claimant's condition, and that Claimant's CT scan "confirmed the finding that complicated pneumoconiosis is not radiographically present." (Empl. Memo. of Law on Rem., at 9). Employer argues that Claimant is not entitled to the irrebuttable presumption because the number of interpretations of Claimant's CT scan which found complicated pneumoconiosis are lesser in number than those interpreting the CT scan as negative for complicated pneumoconiosis. Along these lines, Employer asserts that the interpretations of the CT scan that were negative for complicated pneumoconiosis also contained interpretations that found evidence of healed tuberculosis. (Empl. Memo. of Law on Rem., at 10-11).

Upon reconsideration of all of the relevant evidence, I make the following findings. As discussed earlier, I accept Claimant's argument and find that the suggestions of tuberculosis are equivocal and speculative in nature because none of the physicians providing such a suggestion offered any additional information to support their opinion that Claimant's X-rays showed tuberculosis instead of pneumoconiosis. In light of this finding, and upon reweighing the evidence, I find that the X-ray readings by Drs. Wheeler, Scott, Kim, Fino, Shipley, Spitz, and Dahhan are necessarily accorded less weight. Claimant correctly asserts that the interpretations by these doctors are inconsistent with the finding that Claimant has had simple pneumoconiosis, which was established in this case in 1989. The record clearly indicates that, while numerous other doctors and numerous other interpretations of X-rays (that were also interpreted by these doctors) found evidence of at least simple pneumoconiosis, the doctors listed consistently found little to no evidence of any pneumoconiotic opacities and instead made other unsubstantiated suggestions including tuberculosis. The earlier discussion regarding the suggestions of tuberculosis by several physicians who interpreted Claimant's X-rays is to be noted in this respect.

Employer's argument that, because (numerically) more Board-certified, B-reader doctors than not found no evidence of complicated pneumoconiosis, the preponderance of the evidence tips in Employer's favor, ignores the important premise that *all* of the evidence must be weighed in light of the other evidence in the case. This includes consideration of whether the physicians took into account Claimant's employment history, whether those doctors who found no evidence of pneumoconiosis ever physically examined Claimant, and the fact that the Board affirmed the finding that other doctors who found evidence of complicated pneumoconiosis held equal or

superior radiological credentials. The issue of numerical superiority has been addressed by the Fourth Circuit, which disapproves of allowing the number of opinions proffered by one party to serve as the controlling factor in deciding whether pneumoconiosis exists. *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *see also Copley v. Arch of West Virginia, Inc.*, 28 F.3d 1208 (4th Cir. 1994) (unpublished table decision). The court instead favors weighing each individual X-ray on its own merit, and if a conflict in interpretations exists, weighing that conflict to determine the presence of pneumoconiosis. *Copley*, 28 F.3d at 1208.

Of the seven doctors in question, there is no indication that any of them ever physically examined Claimant in addition to reviewing his X-rays. Further, there is no indication that six of these seven doctors took into account Claimant's 35-year coal mining employment history. While Dr. Fino did examine Claimant's medical records and noted Claimant's 35-year coal mining employment history, his report (found at DX-42) also found "insufficient evidence upon which to make a diagnosis of a coal dust-related lung condition." (DX-42, at 3). On the other hand, Drs. Patel, Alexander, and Cohen read the CT scan as showing evidence of complicated pneumoconiosis, in addition to interpreting the X-ray evidence and reaching a similar conclusion. Dr. Alexander is Board Certified in Nuclear Medicine in addition to being Board Certified in Radiology and a B reader. Dr. Wiot's X-ray interpretations also weigh heavily in favor of complicated pneumoconiosis. Dr. Alexander's X-ray interpretations are well-reasoned and well-documented, as evidenced in the fact that not only does he state his observation of a Category A size opacity, but he also provides precise measurements of the opacity, as well as indicating its location. (CX-1). Dr. Cohen, a B reader, also provided measurements of the opacity as he observed it. (CX-4). Dr. Patel found evidence of complicated pneumoconiosis, and his interpretations were taken into account by Dr. Boustani, Claimant's treating physician, during her physical examinations of Claimant. (DX-55; DX-81; CX-3). For these reasons, including the fact that the record clearly establishes that Claimant has had at least simple pneumoconiosis since 1989, I find that the X-ray readings by Drs. Wheeler, Scott, Kim, Fino, Shipley, Spitz, and Dahhan are necessarily accorded less weight.

Employer's argument that Dr. Wiot's opinion is hindered because Dr. Wiot did not interpret six more recent X-rays fails. It is well-established that pneumoconiosis is a progressive disease. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987). Therefore, a finding that complicated pneumoconiosis existed in 1996 would necessarily be followed by a finding that it also existed in 1997 and in 2002. Although Dr. Wiot did not interpret the more recent X-rays, Dr. Alexander, who found evidence of complicated pneumoconiosis as early as September 9, 1992, (CX-1), did examine several of these later X-rays and found that the X-rays "demonstrate[] the classical progression of simple Coal Worker's Pneumoconiosis of moderate profusion to complicated Coal Worker's Pneumoconiosis with bilateral upper zone large opacities." (CX-1). For the later X-rays, more specifically, the X-ray dated November 19, 1997, Dr. Alexander found large opacities in both upper zones with a maximum summed diameter of 45 millimeters, which places the opacities in Category A for complicated pneumoconiosis. (CX-1). Dr. Alexander made similar findings when he interpreted X-rays dated March 23, 1998, and November 4, 1998; his reading of a CT scan taken on May 19, 1998, also yielded a finding of complicated pneumoconiosis. (CX-1). Dr. Alexander's credentials lead to greater weight being accorded to his findings. This finding takes into account the "later evidence rule" as it has been announced by the Fourth Circuit. *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992)

(finding that "later evidence is more likely to show the miner's current condition" so long as the evidence, on its face, shows that the miner's condition has worsened).

As to the weight of Dr. Wiot's X-ray interpretations and findings of complicated pneumoconiosis, I find that the Dr. Wiot's opinions are entitled to great weight. As mentioned previously, Dr. Wiot is not only a B reader, but is also a Board Certified Radiologist and is a member of the American College of Radiology Task Force on Pneumoconiosis, which is the body requested by National Institute for Occupational Safety and Health ("NIOSH") to develop of the B reader program. (D&O, at 27). As I noted in the original Decision and Order Awarding Benefits, Dr. Wiot read the July 28, 1995, August 9, 1996, August 27, 1996, and February 19, 1997, X-rays as revealing Category B large opacities. (D&O, at 30). In discussing his reading of the August 9, 1996, X-ray in particular, I noted that he held credentials superior to those of the other Board Certified Radiologists and assisted in the development of the B reader program, and therefore, gave his interpretation of that particular X-ray greater weight. (D&O, at 28). While Dr. Wiot did not interpret the six more recent X-rays, I find that his interpretations regarding findings of complicated pneumoconiosis are nevertheless entitled to greater weight due to the strength of his credentials, which are superior to the other physicians who interpreted Claimant's X-rays.

As to the inclusion of Dr. Castle in the group of physicians who did not find evidence of simple pneumoconiosis when interpreting Claimant's X-ray readings, upon review of Dr. Castle's opinions, I find that Dr. Castle should have been included in the group of physicians who did find simple pneumoconiosis, but who did not find evidence of complicated pneumoconiosis. Dr. Castle examined six X-rays and found evidence of pneumoconiotic opacities on each of the six X-rays, which is consistent with the finding of simple pneumoconiosis made in 1989. To this extent, however, I do not find that Dr. Castle's opinion is entitled to greater weight such that my finding that the X-ray evidence established complicated pneumoconiosis should be altered. In interpreting Claimant's X-rays, Dr. Castle also found, on two X-rays, evidence that he considered consistent with tuberculosis, though he offered no additional information to substantiate his suggestion. While it is true that Dr. Castle examined Claimant on two occasions (February 19, 1997, and November 4, 1998), it is also true that Dr. Castle took into account, in his evaluation of Claimant, an incorrect piece of data, specifically Claimant's history of cigarette smoking. (DX35 (noting a 35-year history of smoking)).[6] Further, Dr. Castle, a B reader, holds lesser credentials than those possessed by other physicians who interpreted Claimant's X-rays, namely Drs. Wiot and Alexander. For these reasons, Dr. Castle's opinion is entitled to less weight.

In light of these findings, I further find that Claimant has met his burden in establishing a material change of conditions pursuant to 20 C.F.R. §725.309 (2000). As in the original Decision and Order Awarding Benefits, I again find that the record contains many opinions that Claimant suffers from complicated pneumoconiosis. The X-ray interpretations that found evidence of large opacities of at least Category A size were all provided by highly qualified physicians who, with the exception of one physician, were either B readers, Board Certified Radiologists or both. Other B reader and Board Certified Radiologists also provided

[6] *See also* D&O, at 22 fn.11 (finding that the 35-year smoking history noted by Dr. Castle was "grossly inconsistent with the 8-year smoking history appearing multiple times in the record").

interpretations of these X-rays but did not find evidence of large opacities; however, more important is the fact that many of these physicians did not find evidence of even *simple* pneumoconiosis, which, as mentioned above, has been established in this case since 1989. These negative X-ray readings are necessarily accorded less weight, especially in light of the finding that the suggestions of tuberculosis within this case are speculative in nature and unsupported by further evidence. Further, the BRB did not disturb the finding made in the original Decision and Order Awarding Benefits that the CT scan evidence established that Claimant has complicated pneumoconiosis. (BRB, at 12). As a result, I conclude that Claimant is entitled to the irrebuttable presumption of §718.304 that he is totally disabled because he has established by a preponderance of the evidence that he has complicated pneumoconiosis. Moreover, even if the Claimant had been found not to have met his burden of establishing the existence of complicated pneumoconiosis by x-ray evidence, the CT scan evidence would be sufficient to outweigh the x-ray evidence and to establish that he has complicated pneumoconiosis.

Accordingly, because I find that Claimant has complicated pneumoconiosis, and that it was previously found that Claimant had only simple pneumoconiosis, I find that Claimant has met his burden of establishing a material change of condition pursuant to 20 C.F.R. §725.309 (2000). Because the irrebuttable presumption applies, the Claimant, after 35 years of coal mine employment, is entitled to federal black lung benefits.

Date of Onset of Award of Benefits

In its decision, the Board found that the ALJ determined that Claimant had established both a mistake in determination of fact under 20 C.F.R. §725.310 (2000), as well as a material change in condition under 20 C.F.R. §725.309 (2000), by establishing that he has complicated pneumoconiosis. (BRB, at 13). Based upon the material change in condition, the ALJ held that benefits were payable from September 12, 1989, the date of Judge Kichuk's Decision and Order denying benefits in the original claim. However, the BRB held that error was committed when the ALJ "did not additionally discuss the import of the fact that claimant established a mistake in a determination of fact." (BRB, at 13). Therefore, the Board vacated the decision of the ALJ to award benefits from September 12, 1989. (BRB, at 13).

The Board also found that the ALJ failed to apply a preponderance of the evidence standard[7] in determining the date from which benefits commence, and that the ALJ committed error when he "rel[ied] on evidence of complicated pneumoconiosis that predates Judge Kichuk's May 5, 1998 denial of the instant claim."[8] (BRB, at 13). On remand, the Board instructed, if benefits were awarded, that this decision include a discussion of the import of the fact that Claimant established a mistake in determination of fact under 20 C.F.R. §725.310 (2000), as well as consideration of the relevant evidence, using the preponderance of the

[7] According to the BRB decision, both Employer and the Director agreed that the preponderance of the evidence standard was not used in determining the date from which benefits were payable. (BRB, at 13).

[8] *See* fn.5, *supra* (discussing the typographical error committed by the Board when making this reference, and discussing the argument by Counsel for Claimant that the Board intended this reference to be to Judge Kichuk's September 12, 1989, decision).

evidence standard, to determine the date from which benefits were payable pursuant to 20 C.F.R. §725.503(d)(2).

In the original Decision and Order Awarding Benefits, I found that Claimant timely filed a request for modification of Judge Levin's decision under 20 C.F.R. §725.310. (D&O, at 7). Claimant could succeed on his request for modification if he showed either a change of condition or a mistake in a determination of fact, pursuant to 20 C.F.R. §725.310. I found that a mistake was made in the determination of fact within the meaning of 20 C.F.R. §725.310 by Judge Levin when he denied Claimant's duplicate claim, thereby allowing the undersigned to "'step back into the shoes'" of the prior ALJ and consider *de novo* the duplicate claim for benefits as if I had decided the case at the time Judge Levin did. (D&O, at 28). Looking at the instant case in that posture, because Claimant filed a duplicate claim (under 20 C.F.R. §725.309 (2000)), that meant that the duplicate claim would be denied unless Claimant could show a "material change of condition" since the 1989 denial. Section 725.309 (2000) makes no provision for Claimant to be awarded benefits based on a mistake in determination of fact in the case of a duplicate claim. Therefore, the following analysis will not be based upon the finding of a mistake in a determination of fact, because that finding was only as to the request for modification, but instead will be as to the duplicate claim, for which I have found a material change in condition was established.

Upon consideration of Claimant's duplicate claim, the undersigned considered all of the evidence of record, and found that Claimant "established a material change of conditions following the denial of his claim by Judge Kichuk on September 12, 1989." (D&O, at 31). I found that "the earliest date that the Claimant was diagnosed with complicated pneumoconiosis was October 1, 1985," but the Claimant was entitled to benefits from September 12, 1989, since the decision awarding benefits was based on a finding of a material change of condition since the initial claim had been denied. (D&O, at 31).

Claimant argues that benefits are payable either from "the date of onset of total disability, or, if the evidence fails to establish a specific date of onset, [Claimant] is entitled to benefits beginning on the filing date of the duplicate claim, July 18, 1996." (Cl. Memo. of Law on Rem., at 13). Claimant asserts that the Director, in his brief to the BRB, agreed with Claimant's position that Claimant could be entitled to benefits commencing prior to the date on which he filed his claim if he can prove that he had complicated pneumoconiosis prior to filing his claim. (Cl. Memo. of Law on Rem., at 13 (citing Director's Letter Brief to BRB, Sept. 27, 2002, at 2)). Claimant states that the Fourth Circuit has addressed the issue of duplicate claims and the determination of the onset date for the purposes of determining commencement of compensation. Claimant cites *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996), for the proposition that in cases of a duplicate claim, a claimant is not entitled to benefits for the period before his prior claim was denied. (Cl. Memo. of Law on Rem., at 13). Therefore, Claimant asserts that Claimant is not entitled to payment of benefits prior to the denial of his claim in 1989 by Judge Kichuk. (Cl. Memo. of Law on Rem., at 13).

Claimant argues that the appropriate date for the onset of complicated pneumoconiosis, and therefore, for the commencement of benefits, is September, 1992. (Cl. Memo. of Law on Rem., at 14). Claimant reasons that the first positive evidence that Claimant had complicated

pneumoconiosis that was found after the 1989 denial of Claimant's claim is found in interpretations of an X-ray taken on September 9, 1992. (Cl. Memo. of Law on Rem., at 14). Further, Claimant maintains that X-rays taken on July 28, 1995, and February 19, 1996, were also positive for complicated pneumoconiosis. (Cl. Memo. of Law on Rem., at 14). As to the September 9, 1992, X-ray, Claimant points out the positive readings and findings of opacities of Category A size by Drs. Alexander and Cohen. Claimant also highlights that this X-ray was read as showing "densities" that some physicians attributed to tuberculosis; Claimant contends that the readings noting tuberculosis should be discredited, as noted in the discussion above. (Cl. Memo. of Law on Rem., at 14). Therefore, Claimant argues that the preponderance of the medical evidence supports a finding of complicated pneumoconiosis as of September, 1992. (Cl. Memo. of Law on Rem., at 14).

To support his position, Claimant argues that the Fourth Circuit's reasoning in *England v. OWCP*, No. 95-2173, (4th Cir. July 28, 1997) (unpublished), should be applied to the instant matter. Claimant asserts that in *England*, the claimant was also initially diagnosed with simple pneumoconiosis, but later presented additional evidence that the ALJ found established that the claimant had complicated pneumoconiosis, triggering the irrebuttable presumption under 20 C.F.R. §718.304, and that a change of condition had occurred. (Cl. Memo. of Law on Rem., at 14 (citing *England v. OWCP*, No. 95-2173, slip op. at 5 (4th Cir. July 28, 1997) (unpublished))). Claimant argues that the Fourth Circuit affirmed the finding of the ALJ that the onset date was established as of the date of the first evidence of complicated pneumoconiosis, and that the same analysis and result is appropriate in the instant matter. (Cl. Memo. of Law on Rem., at 14). In the alternative, Claimant maintains that if the September, 1992, date is not accepted by the court, that the latest date that the court should determine as the onset date is the filing date of the duplicate claim, July, 1996, since "the record does not support a finding that [Claimant] developed complicated pneumoconiosis after July 1996." (Cl. Memo. of Law on Rem., at 15).

Employer argues that the date of onset of complicated pneumoconiosis cannot precede July, 1996, because this case involves a duplicate claim filed in July, 1996. (Empl. Memo. of Law on Rem., at 17 (citing *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996))). Employer further asserts that, "[s]ince the presence of complicated pneumoconiosis must be proved by a preponderance of the evidence, . . . proof of complicated pneumoconiosis for onset purposes must also be proved by a preponderance of the evidence." (Empl. Memo. of Law on Rem., at 17 (citing 20 C.F.R. §718.403) (remaining citations omitted)). Therefore, Employer argues, "[i]f the opinions of Drs. Wiot, Gaziano, Ranavaya, Alexander, and Cohen are found to constitute the preponderance of the evidence" as to the August 9, 1996, X-ray, the earliest onset date would be August, 1996. (Empl. Memo. of Law on Rem., at 17).

As stated above, upon consideration of all of the evidence, I have found that Claimant has met his burden of establishing a material change of condition pursuant to 20 C.F.R. §725.309 (2000). In discussing the appropriate date to determine the date from which benefits are payable where a claimant has proven a change in condition, the Board discussed 20 C.F.R. §725.503(d)(2), and stated:

> For a change in conditions, benefits are payable as of the month of onset of total disability due to pneumoconiosis, provided that no benefits are payable for any

> month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge.

(BRB, at 12 (citing 20 C.F.R. §725.503(d)(2))). Additionally, if a change of condition is the basis for a modification and the evidence does not establish the month of onset, benefits are payable from the month in which modification was requested. 20 C.F.R. §725.503(d)(2) (2003). The previous Section 725.503(b) (2000) similarly stated that if a material change in condition is proven by a claimant, benefits are payable "beginning with the month of onset of total disability." In interpreting the predecessor to §725.503(d)(2), the Fourth Circuit held that in the case of a duplicate claim, a claimant is not entitled to benefits for the period prior to the denial of the previous claim. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996).

The issue that must be addressed, then, is the month of onset of total disability due to pneumoconiosis; I have already determined that Claimant is entitled to the irrebuttable presumption of Section 718.304 that he is totally disabled due to pneumoconiosis. As directed by the BRB, the onset date must be established by a preponderance of the evidence. Upon consideration of all of the evidence, I find that Claimant has established by a preponderance of the evidence that he suffered from complicated pneumoconiosis and was totally disabled as of September 9, 1992. The interpretations of the X-ray taken on that date by Drs. Alexander and Cohen credibly indicate that Category A large opacities were present on that date. Dr. Alexander indicated a profusion of 2/2, while Dr. Cohen indicated a profusion of 1/2. (CX-1; CX-4). Further, both Drs. Alexander and Cohen had interpreted previous X-rays taken in October, 1985, and both reported pneumoconiotic opacities at that time. (CX-1; CX-4).

Interpretations by other physicians of the X-ray taken on September 9, 1992, are not credible for the reasons stated in the above discussion, including the fact that Drs. Wheeler, Scott, and Kim found no evidence of even simple pneumoconiosis on that X-ray, even though such had been established since 1989. The interpretation of the September 9, 1992, X-ray by Dr. Jarboe, in which he found that no large opacities existed and that the profusion of the opacities that did exist was 1/1, is not entitled to greater weight than Dr. Alexander's opinion. (EX-11). While Dr. Jarboe is a B reader, Dr. Alexander has stronger credentials, as he is not only a B reader, but also is a Board Certified Radiologist and Board Certified in Nuclear Medicine. Dr. Sargent, a B reader and a Board Certified Radiologist, reached a similar conclusion to that reached by Dr. Jarboe, and additionally noted the possibility of tuberculosis. (DX-71). However, again Dr. Alexander's opinion is entitled to greater weight because of his credentials, and also because of the aforementioned reasons of discrediting the suggestions of tuberculosis without further substantiating evidence.

The record reflects that, prior to September 9, 1992, X-rays were taken on the following dates: April 3, 1984; April 8, 1984; April 11, 1984; June 10, 1985; October 1, 1985; October 13, 1985; and September 8, 1986. (DX-33; DX-73; CX-1; CX-4; EX-5; EX-7; EX-11). The record is devoid of any X-rays between 1986 and 1992, except for an X-ray taken when Claimant fractured his ribs and clavicle in May, 1987. In that X-ray, Dr. Starr diagnosed, among other things, coal workers' pneumoconiosis. (DX-33, at 208-11). As in *England v. OWCP*, No. 95-2173, (4th Cir. July 28, 1997) (unpublished), "the medical evidence in the record does not make it possible to determine the actual date on which [the claimant]'s pneumoconiosis became

complicated," and therefore became totally disabled. *England v. OWCP*, No. 95-2173, slip op. at 4 (4th Cir. July 28, 1997) (unpublished). In *England*, however, the Fourth Circuit found that the appropriate date to use to commence payment of benefits was the date on which the first evidence of complicated pneumoconiosis was found because the filing date occurred prior to the determination that the claimant in that case was totally disabled. *England*, No. 95-2173, slip op. at 4-6.

I find that the logic applied in *England* is appropriate to the instant matter. It was previously established that as of Judge Kichuk's decision in September, 1989, Claimant suffered only from simple pneumoconiosis. A period of approximately six years (1986 to 1992) passed without any X-rays (except the one taken by Dr. Starr for a purpose altogether removed from the process of diagnosing whether Claimant suffered from pneumoconiosis). However, the preponderance of the evidence demonstrates that when the X-rays did resume, on September 9, 1992, Claimant was at that time suffering from and totally disabled by complicated pneumoconiosis. Therefore, the appropriate date for establishing the onset of total disability due to complicated pneumoconiosis falls on the date of the September 9, 1992, X-ray. Because the pertinent regulation, 20 C.F.R. §725.503(d)(2) reads in such a manner that "benefits are payable beginning with the *month* of onset of total disability due to pneumoconiosis," the more appropriate statement is that Claimant was totally disabled as of September, 1992. This date is appropriate, too, because my decision in this case is from the standpoint of standing in Judge Levin's shoes as if I were deciding the case as it was presented to him. In this regard, Claimant correctly states that the onset date cannot be established prior to the denial of the original claim in 1989, but the onset date can be established prior to the date on which the duplicate claim was filed, in accordance with the Fourth Circuit's decision in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996).

Employer misunderstands the posture in which Claimant's duplicate claim is being addressed. Because the undersigned is standing in the shoes of Judge Levin, Claimant must establish that, *as of the date that the duplicate claim was filed*, he had experienced and could prove a material change in condition. Therefore, it stands to reason that the date of onset of total disability due to pneumoconiosis fell in the time period *since* the time that the previous (original) claim had been denied and *prior to* the filing of the duplicate claim. Further, as explained above, I have found that a preponderance of the evidence proves that Claimant suffering from and totally disabled by complicated pneumoconiosis as of September, 1992.

ORDER

Accordingly, it is hereby ordered that Employer, Westmoreland Coal Company:

1. Pay to Claimant, Charles Edward Cooper, all federal black lung benefits to which he is entitled, commencing September 9, 1992, as augmented by his dependent wife, Norma Jean Cooper;

2. Pay for or otherwise provide all medical benefits to which Claimant is entitled;

3. The benefits paid hereunder shall be offset by virtue of any awards to the Claimant for workers' compensation for occupational disease by the State of West Virginia.

A

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this decision and order by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.